No. 75-844

In the Supreme Court of the United States

OCTOBER TERM, 1975

EMERSON SUSENKEWA, ET AL., PETITIONERS

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 520 F.2d 1324. The opinion of the district court (Pet. App. 7a-9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1975, and a petition for rehearing was denied on September 18, 1975 (Pet. App. 6a). The petition for a writ of certiorari was filed on December 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Indian Tribe is an indispensable party in a suit by certain members of that Tribe against

the Secretary of the Interior and a private company, seeking to set aside a coal mining lease signed by the Tribe, and approved by the Secretary.

STATEMENT

Petitioners, a sixty-member "traditional" faction of the 5,000-member Hopi Tribe, instituted this action against the Secretary of the Interior and Peabody Coal Company[1] to cancel a coal mining lease entered into by the Tribe and Peabody.[2] The lease, which was approved by the Secretary of the Interior, permits surface mining of land known as the Black Mesa, which is sacred to the "traditional Hopis." Although petitioners sought cancellation of the lease, they did not join as parties defendant either the Hopi or Navajo Tribes, which jointly possess the beneficial interest in and are lessors of the land, or the United States, which holds fee title to the land in trust for the Tribes. The district court dismissed the complaint for failure to join these three indispensable parties, and denied petitioners' motion to join the United States and the Hopi Tribal Council and the Navajo Tribe (Pet. App. 9a). The court of appeals affirmed on the ground that the Hopi Tribe, as lessor, was an indispensable party which, because of its sovereign immunity to suit, could not be joined without its consent or the consent of Congress, neither of which had been demonstrated (Pet. App. 6a). The court therefore declined to reach the question whether the Navajo Tribe or the United States

[1]Six power companies with ownership interests in two electric generating plants supplied with coal from the lands involved in this lease under contract with Peabody intervened below.

[2]Petitioners' contention (Pet. 13 n. 6) that they did not seek to void the lease, but only to set aside the Secretary's approval of it, is frivolous, for as they admit (Pet. 37), his approval is a statutory prerequisite to its validity. 25 U.S.C. 415a.

were indispensable parties, or whether their sovereign immunity would prevent their joinder if they were determined to be indispensable parties (Pet. App. 2a).

ARGUMENT

This suit involves an internal dispute among members of the Hopi Tribe holding differing views of the true meaning of Hopi culture and religion and the direction tribal life should take. The complaint charged the Secretary with violating his fiduciary duty to insure the survival of the traditional Hopi culture, religion and ways of life; of arbitrarily interfering with internal tribal affairs and of discriminating against the traditional Hopi faction.[3] But the constituted government of the Hopi Tribe has not sought to withdraw from the lease or to charge that the United States violated its trust in approving the lease. Petitioners do not identify any specific federal statute that the Secretary purportedly violated in approving this lease.

1. The courts below properly held that this suit could not be maintained without joining the Hopi Tribe as a party (see Rule 19, Fed. R. Civ. P.). Compare *Arizona* v. *California*, 298 U.S. 558, 572. It is well established that in a suit to cancel a lease, all persons who will be directly affected by the decree, such as the lessor, are indispensable parties. *Broussard* v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (C.A. 5); *Keegan* v. *Humble Oil & Refining Co.*, 155 F.2d 971 (C.A. 5); 3A Moore's *Federal Practice*, para. 19.09[1], pp. 2312-2314 (2d ed. 1974).

[3]Petitioners concede (Pet. 13) that "[n]one of the rights [they assert] arises out of, or is in any way affected by or dependent on, the terms or provisions of the lease."

Cancellation of the lease unquestionably would have an adverse effect upon the Hopi Tribe (Pet. App. 5a). Over the term of the lease, the Tribe will collect royalties in excess of $20 million, and it also benefits indirectly through the resulting employment of many of its members (*ibid.*). Since the Tribe is a co-lessor of the land, it is obvious that the prejudice that would befall it from the cancellation of the lease could not be lessened or avoided by protective measures in a judgment affording that relief (*ibid.*). Furthermore, any judgment rendered in the Tribe's absence could not provide adequate relief (Pet. App. 5a). Contrast *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102.[4]

Moreover, if petitioners are unable to convince the Hopi Tribal Council that the lease should be cancelled or modified, they have such rights against the Tribe as are provided by the Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. 1301 *et seq.*[5] In light of these circumstances, the court of appeals properly applied the considerations set forth in Fed. R. Civ. P. 19(b) in dismissing the suit for failure to join the Hopi Tribe. See *Provident Tradesmens Bank & Trust Co., supra*, 390 U.S. at 118-119.

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[4]The most obvious distinction between this case and *Provident Tradesmens* is that in the latter, a judgment for the insurance company posed no significant threat of harm to the absent party, while here, the opposite is true with respect to the absent Tribe. *Id.* at 114-115.

[5]As implemented by 28 U.S.C. 1343(4), that Act gives federal courts jurisdiction to enforce carefully defined rights of individual Indians against the Tribe. See, *e.g.*, *Johnson* v. *Lower Elwha Tribal Community*, 484 F.2d 200 (C.A. 9); *Daly* v. *United States*, 483 F.2d 700 (C.A. 8). Petitioners, however, have not suggested that this lease violated any of their rights guaranteed by the Indian Civil Rights Act.

Tewa Tesuque v. *Morton*, 498 F.2d 240 (C.A. 10), certiorari denied, 420 U.S. 962, is squarely in point. Certain members of an Indian Tribe brought an action against the Secretary of the Interior and a private developer to cancel a real estate lease between the Tribe and that company. The dissidents argued that the lease was unfavorable to the Tribe and should not have been approved by the Secretary, and that the lease prevented them from practicing their traditional religion. There, as here, the absent Tribe was not subject to suit because of its sovereign immunity.[6] After considering the four factors specified in Rule 19(b), the court found that the Tribe was an indispensable party, thus requiring dismissal of the suit. That court's observation is also appropriate in this litigation—internal tribal disputes should be decided by the Tribal Council, not by the federal courts.

2. The decision of the court below does not conflict with any decision of this Court or of any court of appeals.

National Licorice Co. v. *National Labor Relations Board*, 309 U.S. 350, upon which petitioners rely (Pet. 18-22), is wholly inapplicable. The National Labor Relations Board instituted that action by petitioning the court of appeals for enforcement of its order directing the employer-defendant to desist from unfair labor practices. This

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[6]Contrary to petitioners' assertion (Pet. 28), *Ex parte Republic of Peru*, 318 U.S. 578, does not establish that a sovereign's immunity from suit can only be considered after it is ordered joined in the litigation and has raised that defense. There, the district court already had acquired jurisdiction through the *in rem* seizure of a foreign vessel. The question before the Court was not whether jurisdiction could be obtained over a sovereign by service of process, but whether *in rem* jurisdiction should have been relinquished after the federal government filed a suggestion of the vessel's sovereign immunity from suit. *Id.* at 588.

Court did not consider the applicability of the predecessor of the current Rule 19 to that litigation. Moreover, the joinder principles adopted by the Federal Rules of Civil Procedure were irrelevant to its determination, for those Rules govern only the procedures followed in the United States district courts. Fed. R. Civ. P. 1.[7]

Contrary to petitioners' assertion (Pet. 25-27), the court of appeals' decision does not conflict with either *Littell* v. *Morton*, 445 F.2d 1207 (C.A. 4), or *Davis* v. *Morton*, 469 F.2d 593 (C.A. 10). In *Littell*, an attorney who formerly had obtained substantial legal judgments for an Indian Tribe sought to overturn the Secretary of the Interior's denial of his claim for compensation for fees allegedly withheld in breach of his contract with the Tribe, which the Secretary had approved. Without discussing Rule 19, the court held that sovereign immunity could not bar this contract claim for services rendered, where that result would unjustly enrich the Tribe. Here, however, petitioners are not parties to the lease and do not claim that it has been breached; rather than seeking to enforce the lease, they are trying to annul it. Moreover, no claim of unjust enrichment is involved.

Davis v. *Morton*, *supra*, simply established that the Secretary of the Interior's approval of a long-term lease of restricted Indian land under 25 U.S.C. 415 was a major federal action affecting the environment under

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In any event, the Court there held that the Board, asserting "a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices" (309 U.S. at 364), had authority, in the absence of the individual employees as parties to that proceeding, to order an employer not to enforce a provision of their employment contracts found to have been procured in violation of federal law. Here, in contrast, a small faction of Hopis, who are not a public body, are seeking to invalidate a mining lease to the disadvantage of the entire Tribe, without joining the lessor. Thus, there is no "public right" justification for dispensing with the joinder rule normally applicable in contract cases.

Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). Accordingly, the court enjoined the Secretary from approving a 99-year lease of Indian land until he had prepared an adequate environmental impact statement. Since that suit did not seek to set aside the lease, the question of the joinder of the Indian Tribe-lessor was not raised.[8]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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EDMUND B. CLARK,
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Attorneys.

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[8]Unlike *Heckman* v. *United States*, 224 U.S. 413, this litigation does not involve the assertion of federal authority to cancel the conveyance by Indian grantors of tribal lands alienated in violation of federal law. The United States may fully exercise its distinct governmental interest in restricting such lands, and that interest is not dependent upon its "property * * * rights * * * or to the holding of a technical title in trust." *Id.* at 437. The Court held that since the Indian grantors were in any event precluded from taking any position that would have supported the illegal alienation, they need not have been joined as parties when the United States instituted legal proceedings to vindicate its interest in restricting those lands. *Id.* at 445.

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